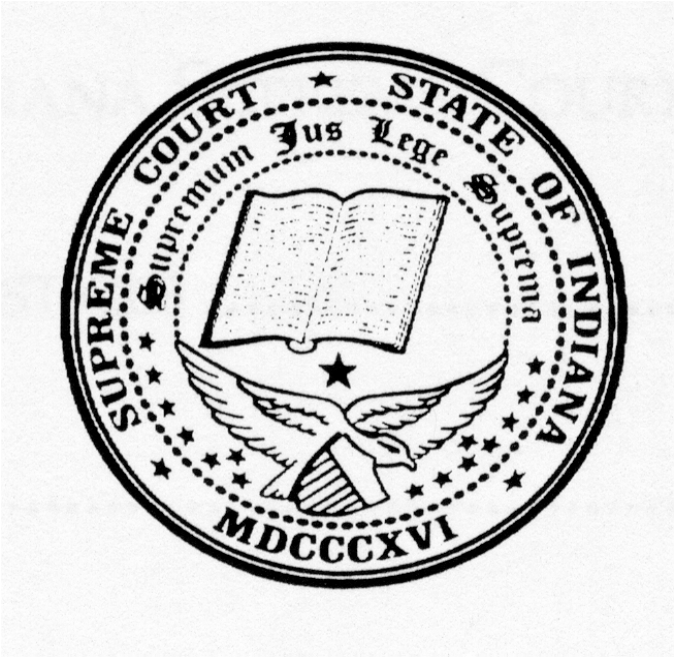
IMMIGRATION ISSUES ARISING

IN INDIANA CRIMINAL COURTS



ARTICLE 36 OF VIENNA CONVENTION

What is Article 36 of the Vienna Convention?

Article 36 of the Vienna Convention on Consular Relations guarantees open channels of communication between detained foreign nationals and their consulates in signatory countries [***Note - both the United States and Mexico were signatories to the Vienna Convention]

Article 36 specifically provides that:

> "If he so requests, the competent authorities of the receiving State shall, without delay, inform the ***consular*** post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the ***consular*** post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;" *Vienna Convention on Consular Relations,* Art. 36(1)(b), Apr. 24, 1963 [1970] 21 U.S. T. 77, 101, T. I. A. S. No. 6820.

Who is responsible for contacting the foreign consulate?

Ideally, the agency originally taking the foreign national into custody should notify the foreign national's consulate. However, a prosecutor's office or the court may also make that notification as well. For a form to make such notification (as well as a listing of regional consular offices), see attached appendices C & D.

Does the foreign consulate always have to be notified?

No. Some countries that were signatories to the Vienna Convention require notification regardless of the intent of the detainee (mandatory notification countries) while others require notification if the detainee indicates that he/she wants such notification (discretionary notification countries). Mexico is not a mandatory notification country. For a list of mandatory notification countries as well as English/Spanish forms to determine whether a foreign national wants his/her foreign consul to be notified, see attached appendices A & B.[1]

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[1] The Attorney General of Texas has created a comprehensive, detailed Magistrate's Guide to the Vienna Convention on Consular Notifications. This guide includes consular notification advisements in the following languages: Arabic, Simplified Chinese, Traditional Chinese, Farsi, French, German, Italian, Japanese, Korean, Polish, Portuguese, Russian, Spanish, and Vietnamese. For more information, you can access this guide at: www.oag.state.tx.us/AG_Publications/pdfs/Vienna_guidebook.pdf

A comprehensive explanation is also provided by the U.S. Department of State with sample forms and translations at http://travel.state.gov/law/consular/consular_636.html

Should foreign nationals of discretionary notification countries still be advised that they have the right to consult with their consulate, even if actual notification is only triggered if they request it?

Yes. Foreign nationals from any country signing the Vienna Convention should be *advised* that they have the right to speak with their consulate office and asked whether they want such notification made. However, notification should only occur for discretionary notification countries, such as Mexico, when the foreign national requests that the notification be made. Do not notify the consulate office for a discretionary notification country if the foreign national expressly indicates that he/she does not wish for such notification to occur. See Appendix B for a suggested advisement on the right to speak with consulate office.

What if a foreign national suspect was not informed that he has a right to consult with his foreign consulate, should any subsequent confession or search be suppressed?

Under current Indiana law, the answer is probably no. In the case of *Zavala v. State*,739 N.E.2d 135 (Ind. Ct. App. 2000), the Indiana Court of Appeals addressed the issue of whether a criminal conviction should be vacated when a police officer violates the Vienna Convention by failing to advise a Mexican national of his right to contact the Mexican Consul. Appellant argued that his conviction should be overturned. The Indiana Court of Appeals disagreed, reasoning that the Vienna Convention is facially ambiguous on the subject of whether the treaty creates individual rights to enforce violations of the treaty and fails to address whether those individual rights would justify suppression of evidence or dismissal of an indictment. Assuming without deciding that an individual would have standing under the treaty, the Court ruled that Zavala could not demonstrate actual prejudice from the alleged violation. In so finding, the Court applied the following test: to establish prejudice, a defendant must show that 1) he did not know of his right to contact the consulate for assistance, 2) he would have availed himself of the right had he known of it, and 3) there was a likelihood that the consulate would have assisted the defendant.

BUT . . . be aware of the following:

Case Concerning Avena and Other Mexican Nationals, Mexico v. United States of America - At the Hague Convention, Mexican authorities asked the International Court of Justice to deem 52 capital cases of Mexican nationals in the Unites States mistrials as the Mexican citizens had not been informed, in violation of the Vienna Convention, that they could get in touch with the consulate. In 2004, the International Court issued a decision that the death penalty proceedings on those 52 cases must be stopped. (*Case Concerning Avena and Other Mexican Nationals, Mexico v. United States of America*, 2004 I.C.J. 128 (2004)).

Medellin v. Dretke - In *Medellin v. Dretke*, 544 U.S. 660 (2005), the U.S. Supreme Court was asked to address the issue of the effect of law enforcement's failure to notify foreign nationals upon arrest of their consular rights under the Vienna Convention. Although the Court accepted review in the case, five months later it dismissed the writ as improvidently granted. The short, unsigned 5-4 opinion, cited President George Bush's memorandum that he issued on Feb. 28, 2005, that stated that the United States would discharge its international obligations "by having State courts give effect to the [International Court of Justice] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision" as part of the reason for dismissing the writ.

Sanchez-Llamas v. Oregon - On March 29, 2006, the U.S. Supreme Court heard arguments in the case of *Sanchez-Llamas v. Oregon*, No. 04-10566, and *Bustillo v. Johnson*, No. 05-51, on the following issues:

1) Does Article 36 of the Vienna Convention on Consular Relations confer on a foreign national detained in the U.S. individual rights of consular notification and access enforceable in the courts of the U.S. by that national, and
2) Does the failure to advise a foreign national detained in the U.S. of his rights under the Vienna Convention result in the suppression of his statements to police?

Petitioner's Argument

The petitioner has argued that Article 36 of the Vienna Convention does create individual rights based on the following: 1) the ordinary meaning of the plain terms of Article 36 make clear that individual rights are created, 2) the Vienna Convention's purpose supports the creation of individual rights in Article 36, 3) the *Travaux Préparatoires* (preparatory work of the treaty) support that Article 36 creates individual rights, 4) the contemporaneous view and subsequent practice of the U.S. Government has been that Article 36 creates individual rights, and 5) the International Court of Justice has concluded that Article 36 creates individual rights. The petitioner further has argued that the appropriate remedy for violation of this individual right is the suppression of petitioner's wrongfully obtained statements.

Respondent's Argument

The respondent has argued that Article 36 does not create individual rights for the following reasons: 1) neither the text nor context of the Vienna Convention establishes a right to information that is enforceable by a foreign national in a domestic criminal proceeding, 2) the negotiation history of the Vienna Convention does not establish such an individual right, 3) the ratification history of the Vienna Convention does not support

that an individual right was established, 4) interpreting that there is an individual right under Article 36 is inconsistent with the Executive Branch's interpretation of the treaty, 5) interpreting that there is an individual right under Article 36 is inconsistent with the interpretation of the treaty by other signatory countries, and 6) the decision by the International Court of Justice also supports the lower court's interpretation of the Vienna Convention (which did not find an individual right). Respondent further has argued that even if Article 36 of the Vienna Convention is construed to create an individually enforceable right, suppression of lawfully obtained evidence in a state criminal proceeding is not the appropriate remedy for violation of that right.

Justices' Reactions at Oral Argument

During the ninety-minute oral argument, the justices primarily focused their questions on the remedy, not the rights question. For instance, Justice Stephen Breyer noted that the International Court of Justice has said that treaty signatories are to provide a reasonable remedy. If the foreign national has a lawyer, he suggested, then perhaps the lawyer should inform him of his right and if the lawyer fails to do so, that is ineffective assistance of counsel. Bustillo's counsel countered, "Relying on the lawyer to do the duty of the state does not effectuate the treaty. The treaty says the state has to notify." Justice David Souter then joined with the following thought, "Yes, the state has to notify, but the lawyer should be taxed with knowing that this is the right, that the treaty is the law of the land, and he should raise the question of whether notice has been given, just as he asks the client if he got his *Miranda* rights. If he doesn't, then it's ineffective assistance." Counsel for Sanchez-Llamas argued that unlike *Miranda* warnings which trigger the potential exercise of other rights, consular access is a "stand-alone right," one that a foreign national has whether or not his lawyer tells him about it.

REMOVAL (DEPORTATION)

What is a "green card"?

A "green card", which is not necessarily green, shows that a foreign national has legal permanent residence, which means that the individual has a right to stay in the United States so long as he or she doesn't commit a deportable act. The foreign national can hold any job in which U.S. citizenship is not a requirement, and he or she can vote in state and local elections that don't require U.S. citizenship, and can petition for visas for a spouse, parents, and minor children. Permanent residents also must pay income taxes, and men 18 to 25 must register with Selective Service.

How does a legal permanent resident become a citizen?

Immigrants can apply for citizenship five years after becoming legal permanent residents.

What are guest workers?

Guest workers have employer-sponsored visas to work in the country for a limited time, usually two to seven years.

Are illegal immigrants' children born in the United States citizens?

Yes.

What makes an individual eligible for removal (deportation)?

1. 8 U.S.C. § 1227 defines the following situations in which an alien is potentially removable (deportable):

    a. Individual was inadmissible at time of entry (came to U.S. illegally in the first place) 8 U.S.C. § 1227(a)(1)(A),
    b. Individual has violated status or whose visa has been revoked (came to U.S. legally but has violated a condition of his/her visa or other conditional status) 8 U.S.C. § 1227(a)(1)(B), (C), (D), (E), (G)
    c. Individual has become deportable due to conviction of certain types of crimes. 8 U.S.C. § 1227(a)(2)
    d. Individual has become deportable due to failure to register or falsification of immigration documents. 8 U.S.C. § 1227(a)(3)
    e. Individual has become deportable due to U.S. security concerns. 8 U.S.C. § 1227(a)(4)

Conviction of what types of crimes will make an alien eligible for deportation?

1. 8 U.S.C. § 1227(a)(2) et seq. lists that an alien is deportable if convicted of any of the following crimes after admission to the U.S.:

    a. Moral Turpitude Crimes: 1) Individual is convicted of a crime involving moral turpitude, 2) crime is committed within 5 years after date of admission (10 years if provided permanent resident status under §1255(j)), and 3) the crime is one in which a sentence of one year or longer may be imposed.

    b. Multiple Convictions: An alien who is convicted of 2 or more crimes involving moral turpitude so long as crimes do not arise out

of a single scheme of criminal misconduct may be deportable regardless of whether alien receives sentence of confinement.

c. Aggravated Felony: An alien convicted of an aggravated felony is deportable.

d. High Speed Flight at Immigration Checkpoint: An alien is deportable if convicted of violation of 18 U.S.C. § 758 (relating to high speed flight from an immigration checkpoint).

e. Controlled Substances: An alien is deportable if:

1) He or she has been convicted of any law relating to a controlled substance;

*** Exception - An alien will not be deportable for a single offense involving possession of marijuana for personal use if the amount is 30 grams or less

2) Alien is or has been a drug abuser or addict since admission to the U.S.

f. Firearm Offenses: An alien if deportable if convicted in violation of state or federal law of a firearms offense (firearms defined in 18 U.S.C. § 921(a)).

g. Espionage, Sabotage, and Treason: An alien is deportable if:

1) convicted of any offense under Chapter 37 (relating to espionage), Chapter 105 (relating to sabotage) or Chapter 115 (relating to treason and sedition) of Title 18, and

2) offense is one for which there is a potential term of imprisonment of 5 or more years,

h. Domestic Violence, Stalking, Violation of a Protection Order or Crimes Against Children

1) Any alien who is convicted of a crime of domestic violence, stalking, or a crime of child abuse, neglect, or child abandonment is deportable.

***"Crime of domestic violence" is defined as any crime of violence against a person committed by:

a) a current or former spouse,

b) an individual with whom the person shares a child in common,

c) an individual who is cohabiting with or has cohabited with the person as a spouse, or

d) an individual similarly situated to a spouse of the

person under the domestic or family violence laws of the jurisdiction where the offense occurs.

2) Any alien who violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.

What is considered an "aggravated felony" under immigration law?

1. 8 U.S.C. §1101(a)(43) provides the complete list of offenses considered to be aggravated felonies. Some examples include the following:
   a) murder, rape, or sexual abuse of a minor
   b) a crime of violence for which the term of imprisonment is at least one (1) year

      *** "crime of violence" is defined as either 1) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or 2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 U.S.C. §16.

      ***Driving while under the influence offenses, which either do not have a mens rea component or require only a showing of negligence in the operation of a vehicle are not crimes of violence under 18 U.S.C. §16. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004).
   c) theft or burglary offense for which the term of imprisonment is at least one (1) year.
   d) illicit trafficking in a controlled substance (controlled substance is defined in 21 U.S.C. §802)
   e) illicit trafficking in firearms or destructive devices (firearms and destructive devices defined is 18 U.S.C. §921)

What are crimes of "moral turpitude" under immigration law?

1. The U.S. Code does not define "moral turpitude", and federal courts generally accord substantial deference to the interpretation of the statutes and regulations (including definition of "moral turpitude") that the Board of Immigration Appeals makes and will uphold the Board's interpretation so long as it is reasonable. *See Reyes-Morales v. Gonzales*, 435 F.3d 937, 944 (8th Cir. 2006); *De Brenner v. Ashcroft*, 388 F.3d 629, 636 (8th Cir. 2004); *Knapik v. Ashcroft*, 384 F.3d 84, 88 (3d Cir. 2004); *Smalley v. Ashcroft*, 354 F.3d 332, 335-36 (5th Cir. 2003); *Michel v. INS*, 206 F.3d 253, 262 (2d Cir. 2000); *Rodriquez-Herrera v. INS*, 52 F.3d 238, 240 n.4 (9th Cir. 1995).

2. Examples of crimes of moral turpitude tend to fall into the following categories:

a. Crimes against the person with malicious intent element: crimes against the person involve moral turpitude whenever a malicious intent is required by the statutory definition of the crime. Such crimes include murder, voluntary manslaughter, kidnapping, assault with intent to kill, assault with intent to rob, and assault with intent to rape. *See In Matter of Awaijane*, 14 I&N Dec. 117, 118 (1972); *Matter of S*, 2 I&N Dec. 559, 562-64 (1946); *De Lucia v. Flagg*, 297 F.2d 58, 60-61 (7th Cir. 1961); *Matter of Nakol*, 14 I&N Dec. 208, 209 (1972); *Matter of C*, 5 I&N Dec. 370, 375 (1953); *Matter of Quadara*, 11 I&N Dec. 457, 458 (1966); *Matter of Beato*, 10 I&N Dec. 730 (1964)

b. Aggravated sexual offenses: aggravated sexual offenses, such as rape, sexual misconduct with a minor and prostitution, have been considered to be offenses involving moral turpitude but nuisance offenses, such as maintaining a nuisance and fornication, have not. *See Matter of Dingena*, 11 I&N Dec. 723, 728-29 (1966); *Matter of Imber*, 16 I&N Dec. 256, 258 (1977); *Matter of W*, 4 I&N Dec 401, 402 (1951); *Matter of A*, 3 I&N Dec. 168, 170 (1948); *Matter of R*, 6 I&N Dec at 454.

c. Crimes against property when intent to deprive, defraud or destroy is an element: crimes against property involve moral turpitude whenever an intent to deprive, defraud, or destroy is required. Blackmail, forgery, robbery, burglary, larceny, extortion, embezzlement and malicious destruction of property have been held to involve moral turpitude but cases of unlawful entry and damaging private property have not. *See Lahmann v. Carson*, 353 U.S. 685 (1957); *Matter of Seda*, 17 I&N Dec. 550, 552 (1980); *Matter of Martin*, 18 I&N Dec. 226, 227 (1982); *Matter of Frentescu*, 18 I&N Dec. 244, 245 (1982); *Chiaramonte v. INS*, 626 F.2d 1093 (2d Cir. 1980); *Matter of F*, 3 I&N Dec. 361, 362 (1949); *Delgado-Chavez v. INS*, 765 F.2d 868, 869 (9th Cir. 1985); *Matter of M*, 3 I&N Dec. 272, 274 (1948); *Matter of N*, 8 I&N Dec. at 468.

d. Crimes against the government: crimes against the government, such as counterfeiting, perjury, willful tax evasion, bribery, and impersonating a government official generally are considered to be crimes against moral turpitude. *See Matter of Lethbridge*, 11 I&N Dec. 444, 445 (1965); *United States ex rel Boraca v. Schlotfeldt*, 109 F.2d 106, 108 (7th Cir. 1940); *Matter of W*, 5 I&N Dec. 759,

764 (1954); *Okabe v. INS*, 671 F.2d at 865; *Matter of Gonzalez*, 16 I&N Dec. 134, 135 (1977). However, if the crime defined is overly broad or lacks a sufficient intent requirement, such as escape from prison or desertion, then it has been held not to involve moral turpitude. *See Matter of J*, 4 I&N Dec. 512 (1951); *Matter of S.B.*, 4 I&N Dec. 682, 683 (1952).

e. Crimes requiring fraud or intent to defraud: courts have consistently held that such crimes are sufficient to justify deportation. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

f. Regulatory violations generally are NOT crimes of moral turpitude: crimes such as gambling have been held not to be against moral turpitude. *See Matter of G*, 1 I&N Dec. 59, 62 (1941).

g. Weapons offenses when committed with a malicious intent: weapons offenses involve moral turpitude when committed with an otherwise malicious intent but not when committed passively. Thus, crime will be considered against moral turpitude if weapon is used in commission of a crime but not when the crime is simply carrying a concealed weapon. *See Matter of Logan*, 17 I&N Dec. 367, 368-69 (1980); *Matter of Medina*, 15 I&N Dec. 611, 612-14 (1976); *Matter of Granados*, 16 I&N Dec. 726, 728 (1979)

If I suspend part of defendant's sentence so that he or she is serving less than a year, will the defendant still be subject to possible deportation if convicted of a moral turpitude crime?

Yes. §1227 states that an alien is eligible for deportation for conviction of a moral turpitude crime if a sentence of one year or longer *may* be imposed (if within 5 years after entry to U.S). Further, 8 U.S.C. §1101(a)(48)(B) states that "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."*

What if the conviction is vacated due to expungement or granting a PCR - will the defendant still be subject to possible deportation?

It depends on the reason given for granting the expungement/PCR. In *Matter of Pickering*, 23 I&N 621 (BIA 2003), the Board of Immigration Appeals held that if a court vacates an alien's conviction for reasons *solely* related to rehabilitation or immigration hardships (rather than due to procedural or substantive defects in the underlying criminal proceedings), then the conviction remains an aggravated felony for immigration purposes.

What if the sentence is modified or a re-sentencing occurs - will the defendant be subject to possible deportation with that scenario?

Probably not. In the case of *In Re Oscar COTA-Vargas*, 23 I&N 849 (BIA 2005), the Board of Immigration Appeals held that an alien who is convicted of an aggravated felony requiring a sentence of one year or more and then is later re-sentenced to a period of imprisonment less than one year is no longer considered an aggravated felon for immigration purposes, regardless of the reason for the reduction.

What if an alleged victim in a criminal case is in the U.S. illegally, will that person be subject to deportation? Are there any exceptions?

It depends. The individual may be entitled to a waiver under the Violence Against Women Act (VAWA) or other immigration provisions. Given the complexity of such laws, individuals will need to consult with an immigration attorney. A number of pro bono legal organizations/victim's assistance organizations now provide legal assistance regarding immigration matters. For a list of pro bono legal providers in your area, go to http://www.in.gov/judiciary/probono/attorneys/provider/index.html

What if a foreign national-defendant was not advised (either by a court or counsel) of the immigration consequences of a guilty plea, should the court grant a PCR petition brought on that basis?

It depends. Pursuant to *Segura v. State*, 749 N.E.2d 496 (Ind. 2001), failure of defense counsel to advise a defendant that deportation could follow as a consequence of conviction can, under some circumstances, constitute deficient performance sufficient to support an ineffective assistance of counsel claim. To determine whether counsel's performance is deficient in a given case is fact sensitive and turns on a number of factors, including: 1) counsel's knowledge of defendant's status as an alien, 2) defendant's familiarity with the consequences of conviction, 3) the severity of criminal penal consequences, 4) the likely subsequent effects of deportation, and 5) and other relevant factors.

However, the defendant still will need to meet the two-prong test under *Strickland* to prevail on an ineffective assistance of counsel claim on this basis: 1) counsel's performance fell below an objective standard of reasonableness, and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. To state a claim of prejudice from counsel's omission or incorrect description of penal consequences that attaches to both a plea and a conviction at trial, the petitioner must allege "objective facts" supporting the conclusion that the decision to plead was driven by the erroneous advice. Merely alleging that the petitioner would not have pleaded is insufficient.